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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

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THE SUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

To the Honorable, Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The matter involved in this case consists of arbitrary invasion of the constitutional rights of petitioner by the Supreme Court of the State of Wisconsin in a case that came before it on appeal from a judgment of the Circuit Court of Milwaukee County wherein said Supreme Court of Wisconsin in decision of said appeal departed wholly from a long line of its own decisions which had established, and still constitutes, the law of and for the State of Wisconsin and its citizens governing similar cases in jury trials. Such invasion also involved and still involves petitioner's constitutional rights as a natural born citizen of the United States and subject to its jurisdiction guaranteed to him by the first section of the Fourteenth Amendment to the Constitution of the United States of equal protection of the law whereby said Supreme Court of the State of Wisconsin affirmed said judgment of said trial court in total disregard of both said established law in said state and of the protection to petitioner of said clause of said amendment and thereby discriminated against him in this case in ways repugnant and contrary both to the settled laws of said state and to the fundamental law of the nation.

The action out of which such decision of said Supreme Court of Wisconsin arose was brought by said petitioner against respondents for libel (C. 8-20, Bottom pp. 9-21). A trial was had before the court and a jury and as demanded by respondents, a special verdict was submitted to and returned by the jury in which every question, twelve in all, was found and answered favorably to this petitioner (C. 43-45, Bottom pp. 44-46). Thereupon respondents herein moved the trial court to change the answers to the first

two questions of said special verdict, each of which they themselves had presented to the court for its adoption as part of such special verdict (C. 45, Bottom pp. 46-51); and the trial judge in decision of said motions unlawfully altered said portion of the verdict so returned by unauthorized and under the laws of Wisconsin wholly repugnant and prohibited changes in the answers of the jury from "yes" to "no", although abundant credible evidence in the case constituting in fact all the relevant evidence before the court was in support of said answers of the jury (C. 36-39, Bottom pp. 37-40); and in addition wholly ignored all of the other answers of the jury to the remaining questions numbered 3 to 12, both inclusive, which, alone and apart from said first two questions and their answers as returned by the jury, constitute in law a valid basis for judgment in favor of petitioner as will hereinafter be shown herein (C. 54-65, Bottom pp. 55-66). Said Supreme Court of Wisconsin on appeal duly taken arbitrarily and without semblance of right, precedent or authority affirmed and approved both these egregious departures from law together with other like prejudicial and unsupported holdings.

The gist of this action for libel, omitting non-essentials, was the publication in many issues of The Milwaukee Journal, a daily newspaper of Milwaukee printed by respondents, as follows:

> "• • • 'Mayor Hoan travels around the country telling how well Milwaukee is governed,' said the Mayor of Sheboygan Falls. 'Meanwhile terrorists bomb Milwaukee's police stations and banks. Mayor Hoan himself is to blame for those bombings'." (C. 15, Bottom p. 16.)

Obviously the last sentence constitutes the essentials of actionable libel herein.

The Mayor of Sheboygan Falls stoutly denied the authorship of said libel and so was not made a party to the

suit. Respondents here, defendants there, admitted they printed it.

The bombings in question were those that for a period of about ten days which included the repeated publication of said libel shocked, alarmed and stunned the people of Milwaukee by felonious explosions of dynamite which ruthlessly destroyed property amounting to many thousands of dollars, menaced and personally injured citizens until a large portion of the population was panic-stricken, aroused the police, sheriff's force, Federal officials and peace officers generally of the community to a degree never probably equaled in the history of the City, filled the public press with extended and detailed reports of crime and disorder unprecedented in this peaceful metropolis, and finally resulted in the death of three persons, including the two reckless perpetrators of all this criminal violence. When these alarming events were happening and public fear and indignation had reached a climax and the entire population was on the *qui vive,* blame for these "bombings" was bluntly and brutally attributed to your petitioner, though in truth and in fact he was absolutely innocent of the slightest complicity in them as the defendants well knew at least before the second publication of the libel was printed (C. 36-39, Bottom pp. 37-40).

Then it was definitely known and was admitted by respondents themselves that said bombings were the work of two wayward youths, "Idzi" Rutkowski and Paul Chovonec (C. 36-39, Bottom pp. 37-40). This is admitted by stipulation between the parties entered into in the presence of their counsel in open court as follows (title and venue omitted):

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action, all being present with their respective attorneys in open court, that the following statement of facts is true concerning the bombings referred to in the libel alleged and set forth in the complaint herein:

1. That the dynamite, fuses, detonation caps, and other equipment for the detonation and explosion of the dynamite was procured by Idzi John Rutkowski and Paul Chovonec from the magazines of the United States Government at Estabrook Park located in the limits of the City of Milwaukee, Wisconsin.

2. That said dynamite and equipment for its detonation and explosion were removed from said magazines in the nighttime on or about October 2, 1935, transported across the Milwaukee River, and taken to the garage owned by the father of said Idzi Rutkowski located in the rear of the premises known as 2121 W. Mitchell Street, Milwaukee, Wisconsin.

3. That some of said dynamite was used by said Idzi Rutkowski either alone or accompanied by said Paul Chovonec and exploded at the Village Hall of Shorewood in Milwaukee County in the late afternoon or early evening of October 26, 1935, resulting in extensive property damage to said building.

4. That on the following evening, namely, October 27, 1935, other portions of said dynamite so cached at said garage were in like manner used in bombing the branch bank at the intersection of North and Farwell Avenues, and also the branch bank at 3602 W. Villard Avenue, both in the City of Milwaukee, each explosion damaging substantially each bank so bombed belonging to and occupied as branch banks by the First Wisconsin National Bank of Milwaukee.

5. That on October 31, 1935, said Idzi Rutkowski and his said companion removed other portions of said dynamite from the garage at 2121 W. Mitchell Street and therewith bombed two police stations at 3rd and 5th precincts respectively, located at North 3rd and West Hadley Streets, and North 12th and West Vine Streets in the City of Milwaukee, in each case doing substantial property damage to said stations, injuring the occupants and bystanders thereof and menacing their lives.

6. That on November 3, 1935, shortly before 3 o'clock in the afternoon, said Idzi Rutkowski and Paul Chovonec went to said garage and were there killed by

an explosion of much of the remaining supply of dynamite, as was Patricia Mylnarek, nine year old daughter living with her parents Frederick and Clara Mylnarek, and physically injuring seriously many other persons in the neighborhood.

7. That at said time approximately 100 pounds of dynamite of 40% strength was exploded.

8. That said Idzi Rutkowski owned an automobile, the mechanics of which he understood well and was enabled to escape from each of the locations when bombings occurred, except the last when he was killed.

9. That said Idzi Rutkowski was born May 31, 1915, and was arrested by the police of the City of Milwaukee nine times in all from some of which arrests he was released, from others was acquitted and from still others involving larceny he was convicted, placed on probation or fined; that said Paul Chovonec was born May 2, 1919, was arrested by the police eight times between May 26, 1930 to September 9, 1934, most of said offenses being petty larceny, for some of which charges he was dismissed, from others released, from still others placed on probation and on one occasion was sentenced to the St. Charles Home for Boys for one year.

10. That said dynamite and equipment for its explosion was unlawfully and feloniously procured by said Rutkowski and Chovonec, and was unlawfully in their possession in said garage with intent to injure or destroy public or private property, and was exploded as above stated, wilfully and maliciously.

11. That simultaneously with the bombings above mentioned said Idzi Rutkowski wrote letters to the police and conspicuously posted cards in which demand was made, first for $100,000 to secure cessation of the bombings, later raised the demand to $125,000.00 stipulating in each case that payment should be in money, the denominations of the bills varying from $1.00 to $100.00 each.

Dated June 27th, 1940'' (C. 36-39, Bottom pp. 37-40).

Had the publication said, as it did not say, that Rutkowski and Chovonec were to blame for those bombings, it would have told the truth and no one would have any difficulty in understanding the statement (C. 36-39, Bottom pp. 37-40). Instead, respondents, knowing these boys were guilty and petitioner was wholly innocent, shamelessly transferred from them to him the complex of crimes involved in said libels.

This complex of crimes clearly set forth in the evidence included:

(a) Burglary in the nighttime of the United States government storehouse at Lincoln Park in the northern boundary of Milwaukee by breaking the door thereof and entering with intent to commit a felony. This burglary gave access to the dynamite of Rutkowski and Chovonec (C. 38, Bottom pp. 39-40).

(b) Larceny from this storehouse of 150 pounds of such dynamite and a liberal supply of fuses, wires, detonation caps and all other equipment appropriate to the setting off of the stolen dynamite (C. 36-39, Bottom pp. 37-40).

(c) The crime of malicious destruction of property as defined in Section 343.422 Wisconsin Statutes by transporting and exploding said dynamite so as to destroy public and private property and to injure the person and menace the lives of the people of Milwaukee contrary to said statute:

> "343.422 Malicious destruction of property. Any person who shall wilfully or maliciously injure or destroy any building, structure or other property of another, by the use of gunpowder, dynamite or other explosive substance or compound shall be punished by imprisonment in the State prison not more than fifteen years nor less than one year."

(d) The felony of transportation of dynamite for an unlawful purpose as defined in Section 340.73 Wisconsin Statutes, as follows:

> "340.73 Sale, transportation, etc., of explosive for unlawful purpose. Any person who shall make, manufacture, compound, buy, sell, give away, offer for sale or to give away, transport or have in possession any nitroglycerine, giant, oriental or thunderbolt powder, dynamite, balistile, fulgarite, detonite or any other explosive compound with intent that the same shall be used in this state or anywhere else for the injury or destruction of public or private property or the assassination, murder, injury or destruction of any person or persons, either within this state or elsewhere, or knowing that such explosive compounds are intended to be used by any other person or persons for any such purpose, shall be punished by imprisonment in the state prison not more than ten years nor less than three years or by fine not exceeding one thousand dollars nor less than five hundred dollars."

(e) The offense defined in Section 340.74 Wisconsin Statutes of aiding as accessories before the fact the transportation of explosive compounds including said dynamite knowing it was intended to be used for unlawful purposes as mentioned in the last preceding section, is contrary to the following law:

> "340.74 Aiding in so doing. All persons aiding, abetting or in any manner assisting in the manufacture, compounding, buying, selling, offering for sale or transporting any explosive compounds either by furnishing material or ingredients or soliciting or contributing money or other property with which to purchase said material or ingredients, or by assisting by skill or labor, or by acting as agents for the principal, or in any manner aiding as accessories before the fact, knowing that any of such explosive compounds are intended to be used by the principals or any other person or persons for any of the purposes mentioned in section 340.73, shall be deemed principals, and may be convicted and punished in the same manner and to the same extent as such principal or principals."

(f) Attempts at blackmail of banks, city officials and others, including the police and the public generally by demanding publicly in writing the sum of $100,000.00, later raised to $125,000.00, as a condition of cessation of said bombings (C. 39, Bottom p. 40).

Here are six separate crimes indubitably committed as shown by the record herein, by Rutkowski and Chovonec, known by respondents to be the culprits. Respondents nevertheless maliciously transferred the guilt of these two misdirected youths to plaintiff in the libel published in the Milwaukee Journal without the slightest scintilla of evidence or honest excuse for so blackening his reputation.

The special verdict is as follows:

> "Question 1: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in the Milwaukee Journal of November 3rd and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as a principal of the crime of malicious destruction of property?
>
> Answer: Yes.
>
> Question 2: If you answer Question 1 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in The Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as accessory before the fact of the crime of malicious destruction of property?
>
> Answer: Yes.
>
> Question 3: If you answer Questions 1 and 2 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question published in the Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood the statement concerning the plaintiff to charge him with neglect in the performance of his duty as mayor of the City to preserve the public peace

and good order of the City, as to charge him with moral responsibility for the bombings?

Answer: Yes.

Question 4: If you answer Question 3 'yes,' then answer this question: Did such statement tend or calculate to bring the plaintiff into shame, humiliation or disgrace?

Answer: Yes.

Question 5: If you answer Question 3 'yes,' then answer this question: Was such statement in the light of the article as a whole a fair comment on the acts and conduct of the plaintiff in the performance of his duties as mayor of the city of Milwaukee?

Answer: No.

Question 6: In writing the article in question published in the Milwaukee Journals of November 3rd and 4th, 1935, was the defendant, Lawrence C. Eklund, actuated by malice?

Answer: Yes.

Question 8: In publishing the article in question on November 4, 1935, was the defendant, The Journal Company, actuated by malice?

Answer: Yes.

Question 9: In publishing the article in question on November 3, 1935, was the defendant, Harry J. Grant, actuated by malice?

Answer: Yes.

Question 10: In publishing the article in question on November 4, 1935, was the defendant, Harry J. Grant, actuated by malice?

Answer: Yes.

Question 11: If the Court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess his compensatory damages?

Answer: $10,000.00.

Question 12: If you answer any of Questions 7, 8, 9, 10 or 11 'yes,' and decide to assess punitory damages, then answer this question: What sum do you assess as and for punitory damages?

Answer: $10,000.00.

Dated June 28, 1940" (C. 43-45, Bottom pp. 44-46).

II.

EQUALLY ARBITRARY, UNAUTHORIZED AND UNLAWFUL ACTION WAS TAKEN BY THE SUPREME COURT OF THE STATE OF WISCONSIN IN APPROVING TOTAL DISREGARD OF QUESTIONS 3 TO 12 INCLUSIVE OF THE SPECIAL VERDICT AND THE ANSWERS OF THE JURY THERETO.

These answers and questions stand in the record undisturbed and unimpaired as verities in the case. Each one is undubitably sustained not only by credible evidence but also by all the relevant proofs in the case; and under the rule mentioned in Division I of this petition cannot now be disturbed or disregarded. Though requested on the ground of patent error and of violation of petitioner's right under the first section of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the State of Wisconsin denied petitioner's requests on wholly untenable grounds as shall appear by our brief and devoid of any validity whatever. This action of said Supreme Court was and is unauthorized by the long established law of the State of Wisconsin as enunciated by it and applied by it in favor of other litigants under the same conditions as existed herein and still intact except by this solitary, silent departure. It is also an invasion and deprivation of the rights of petitioner to the equal protection of the laws guaranteed to him as a natural born citizen of the United States and subject to its jurisdiction under the first section of the Fourteenth Amendment to the Constitution of the United States. These questions and answers were not stricken, set aside, vacated or their answers disturbed in the slightest degree by said Supreme Court of the State of Wisconsin or by anyone else. They constitute

therefore *verities in the case*, abundantly sufficient to sustain judgment for petitioner and against respondents.

The language of the libel here is express. There is therefore no room for construction or interpretation. Its meaning and implications are unmistakable. The crimes charged were fresh in the memory of the public. The campaign of terrorism was still on when the first publication of defendants appeared, that of November 3, 1935, and the identity of the culprits was well known to them before the second publication, that of November 4, 1935. Nevertheless respondents knowingly, dogmatically and maliciously attributed the criminal rascality of Rutkowski and Chovonec to plaintiff, thus branding him utterly without rhyme or reason for their misconduct. These events were simultaneous practically with the publication of the libel. The circumstances and significance of the lawless defiance of authority and morality were signal and outstanding. They are indeed part and parcel of the libel itself.

The Supreme Court of Wisconsin arbitrarily affirmed the unauthorized, unlawful action by the trial judge whereby the answers of the jury abundantly supported by credible evidence as they were to the first and second questions of the special verdict were changed from "yes" to "no" and thereupon judgment was directed for respondents herein.

The remainder of the verdict, questions and answers numbered 3 to 12, both inclusive, alone constitute a valid cause of action in favor of petitioner and against respondents. They remain intact without change of any sort. They are verities in this case. They were ignored or arbitrarily disregarded in plain violation of uniformly well settled law in Wisconsin. Each of these glaring, illegal and unauthorized actions of the Supreme Court of Wisconsin constitutes a separate invasion of the rights of petitioner not only under the well settled law of Wisconsin; they also

constitute a violation of his right of equal protection of the law under the first section of the Fourteenth Amendment to the Constitution of the United States. We shall briefly further consider them with authorities in our supporting brief attached hereto.

Thus the action of the Supreme Court of the State of Wisconsin in affirming the decision on the appeal presented to it sanctioned the change of the answers of the jury to the first two questions of the special verdict from "yes" to "no" an absolutely arbitrary, unauthorized and unlicensed act on its part which amounted to complete denial to the petitioner as a natural born citizen of Wisconsin and of the United States and subject to its jurisdiction (C. 71, Bottom p. 72), but also of a plain violation of equal protection of the law guaranteed to him by the first section of the Fourteenth Amendment to the Constitution of the United States.

This request for recognition of petitioner's right to equal protection of the laws of this state and of the nation as secured to petitioner by the Fourteenth Amendment to the Constitution of the United States was presented to said Supreme Court of Wisconsin with the request that in the event its decision should be adverse to petitioner's claim of right under said section of the national constitution, review of such decision by this court and the whole case and all of the fundamental constitutional rights of your petitioner in this action might be presented to this court.

Thereupon on July 7, 1941, said Supreme Court of Wisconsin by its decision filed the following decision:

> "*Per Curiam.* On motion for rehearing. In support of his motion for rehearing, plaintiff contends that in trial of the action he was denied due process of law and the equal protection of law under the Fourteenth Amendment to the constitution of the United States. We have carefully examined this contention and find no basis for its support in the record.
>
> Motion for rehearing denied with $25 cost." (pp. 525-526.)

III.

Petitioner respectfully says that the Supreme Court of Wisconsin is the highest court of law or equity in said State of Wisconsin; that the judgment of said court here complained of is a final judgment and presents a question in this case, namely, the power of said Supreme Court of Wisconsin to disregard a long line of its own decisions in which it uniformly held that neither the trial court, nor the Supreme Court has the right to change the answers to questions of a jury as they were changed in this case, nor arbitrarily to deny significance and validity to the portion of the verdict of the jury remaining herein, namely questions 3 to 12, inclusive, and the respective answers to each of them, which, without aid from questions 1 or 2, or either of them, in and of themselves constitute an independent valid basis and cause of action abundantly sufficient to warrant judgment for the plaintiff in the amount of damages found by the jury and that said portion of the verdict has not been disturbed, altered or stricken nor has any answer to any question therein been vacated, stricken or modified in this portion of the verdict in the slightest degree whatsoever. Instead, said Supreme Court of Wisconsin has misunderstood or evaded a decision of this assignment of error on appeal by resort to what this litigant can only regard as the pretext of "conditional privilege" in the situation presented herein which under said Court's own decisions has no standing or validity whatsoever in the face of undisputed facts pertinent to these issues such as petitioner's absolute freedom from fault for any connection with the bombings and the finding in the verdict of malice against petitioner on the part of all respondents and the settled law thereon which we shall present in our brief with comments which utterly destroy the conclusions of said Supreme Court of Wisconsin on these issues.

By either or both of said wide and inclusive departures from settled law and practice, to-wit, (a) arbitrary sanctioning the change of the answers to the first two questions of the special verdict which found the libel herein charged respondents with crime from "yes" to "no"; and (b) the pretext of disposing of the balance of the answers to the remaining ten questions of the special verdict which, taken independently and wholly apart from the first two questions, constitute a perfectly valid basis for a judgment in favor of petitioner herein and against said respondents, on the equally serious charge they tended to bring petitioner into public hatred, ridicule, or contempt, said Supreme Court of Wisconsin made no decision of either issue, but instead, arbitrarily discriminated against your petitioner regardless of evidence, regardless of law and regardless of the rights of your petitioner as a natural born citizen of the United States and subject to its jurisdiction to the equal protection of the laws found in the first section of the Fourteenth Amendment to the Constitution of the United States and by so doing in this one case, contrary to all other of its own adjudications the Wisconsin Supreme Court has arbitrarily denied petitioner fundamental and constitutional rights which, this court can now redress by review of said decision of said Supreme Court of Wisconsin. Otherwise your petitioner will be left utterly without protection, redress or remedy for one of the gravest wrongs that may be inflicted on an American citizen.

IV.

THIS COURT'S JURISDICTION TO ALLOW THIS PETITION IS CLEAR.

The protection afforded to natural born citizens of the United States and subject to its jurisdiction by the first clause of the Fourteenth Amendment to the Constitution of

the United States of equal protection of its laws is not self-enforcing. It is assumed the several states will not lightly refuse to grant such protection or to fail to respond to a request for its aid therein. But on failure of any state so to do the natural born citizen subject to the jurisdiction of the Constitution of the nation cannot be left without remedy for any deprivation of his fundamental rights. Here is such a case. Petitioner is put in the position of submitting to most humiliating violations of his rights under the national constitution or to apply to this court for his remedy.

We respectfully submit that the very existence of the guaranty found in the first clause of the Fourteenth Amendment here in question implies necessarily that some branch of the national government in every meritorious case will exercise the power necessary to make its effectual. Very plainly in the instant case, if this petition for a writ of certiorari from this court to the Supreme Court of Wisconsin be denied the clause referred to of the citizen's right to equal protection of the laws upon proper application may as well be eliminated from the federal constitution; for no more flagrant instance for its vindication can well be imagined.

We further respectfully submit that in perfect harmony with the general conclusion drawn from the language of the constitution itself petitioner's right herein has been reinforced by congressional action.

> Act of Feb. 13, 1925, Chapter 229, 43 Stats. 936, printed as an appendix to the rules of this court, Vol. 307 of United States Court Reports; 83 Law Edition, 1661, 1663, Section 237 (b).
>
> Here it is provided:
>
> "(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ

of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States; *or where any title, right, privilege, or immunity is specially set up or claimed by either party under the constitution,* or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to grant a review on certiorari under this paragraph."

We respectfully submit that the right of petitioner herein, a natural born citizen of the United States and subject to its jurisdiction to the equal protection of the law under Section 1 of Amendment 14 to the Constitution of the United States is a "title, right, privilege or immunity specially set up and claimed by either party under the constitution."

This claim of right of protection against invasion of your petitioner's right as a natural born citizen of the United States and subject to its jurisdiction was raised as soon as it could be anticipated or known to him that the Supreme Court of Wisconsin would do the things the record herein discloses, viz.: to disregard its own most recent decisions, and to ignore petitioner's rights to the extent shown in the decision and opinion of the Supreme Court of Wisconsin set forth in full herein.

In support of these views we cite:

Missouri ex rel. Gaines v. *Canada*, 305 U. S. 337-354, 83 L. ed. 208-215.

In that case, instead of a decision of the highest court of a state within the American Union, the validity of a statute —a legislative act—of the State of Missouri was before this court. Your Honorable tribunal took jurisdiction thereof on certiorari and vindicated the fundamental constitutional right of the colored applicant to public educational opportunities equally with white citizens, but theretofore denied to him. It would seem reasonable to consider that the acts of the three great departments of state government would stand on the same plane and be equally subject to revision by this court when constitutional rights of citizens of this nation are involved. Arbitrary oppressive judgments of the judiciary may injure innocent citizens as well as can unconstitutional legislative enactments. In either case the state itself has acted through one of its three great departments—legislative, executive or judicial. Though each department is separate and independent of the others, none of them can validly set up a claim of "state's rights" if there be involved thereby impairment of the constitutional right of a natural born citizen of the nation and subject to its jurisdiction. For this is a right protected by the fundamental law of the land.

In the Gaines-Canada case, *supra,* pretexts of every sort were indulged to save the offending statute of Missouri, but they were all wiped aside as pretexts merely, ineffective to outweigh the constitutional rights of the petitioner, violation of which might permit them to continue. And so here; as the decision of this court invalidated the statutes of Missouri which was in violation of the fundamental law of the nation, on similar ground this court may now invalidate and reverse the decision herein of the Supreme Court of the State of Wisconsin.

V.

QUESTIONS PRESENTED.

1. The Supreme Court of the State of Wisconsin, contrary to the first section of the Fourteenth Amendment to the Federal Constitution unlawfully and arbitrarily discriminated against petitioner by affirming the decision of the trial judge in changing the answers of the jury to the first two questions of the special verdict contrary to fact and in conflict with a long line of its own decisions without mentioning or overruling those decisions which prohibit rejection or substitution of the answers of the jury if there be any credible evidence in their support as here, where the proof is overwhelmingly in favor of such answers and it is settled law that neither the trial judge nor the Supreme Court of Wisconsin may in such circumstances ignore, change or substitute for the answers of the jury any other answer and thereupon approve judgment in favor of respondents.

2. That said Supreme Court of Wisconsin violated petioner's rights under said section of said Fourteenth Amendment to the Federal Constitution by failing to grant judgment in favor of petitioner and against respondents in said action upon the answers to questions 3 to 12, inclusive, of the special verdict of the jury wherein malice was found against the defendants upon credible evidence and by a long line of decisions of said Supreme Court of Wisconsin, without any dissent therefrom in any other cases, it is settled law that there is no conditional privilege on the part of respondents where express malice is found as in this case nor as is the fact in this case, may there be any judicial recognition of the doctrine of conditional privilege for the defendants where there is in the evidence no scintilla of proof of misconduct of your petitioner in respect of the matter embraced in the libel in this case.

Your petitioner presents to this court and files herewith

a duly certified transcript of the entire record in the case as it appears in the Supreme Court of Wisconsin and a duly certified copy of each, the opinion of that court in this cause and its per curiam decision on the Federal question herein.

VI.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits as grounds of his application and petition herein:

1. That the verdict of the jury by unanimous vote of its members found in his favor on every issue submitted to it in a special verdict of a dozen questions. The Supreme Court sanctioned and approved and gave final effect as the court of last resort of said State of Wisconsin to the setting aside of affirmative answers to the first two of those answers and substituting therefor negative answers to them in violation of a long line of decisions of its own settling the law of the State of Wisconsin on the subject beyond any doubt whatever that if the verdict of the jury on any subject about which there is room for difference of opinion decides a question or a series of questions in accordance and in harmony with the credible evidence in the case, no judge, not even the Supreme Court itself, may change any such answer of the jury.

That however recreant the judiciary of any state may become in the administration of justice no person within the scope of the first section of the Fourteenth Amendment to the Constitution of the United States may be denied equal protection of the law; and if he cannot secure such protection in the courts of his own state he may rightfully carry the case to the Supreme Court of the United States.

2. That apart from the first two questions and the answers thereto in the special verdict in this case there were ten other questions and the answers thereto which, independently and of themselves, establish a cause of ac-

tion in favor of petitioner and against respondents on the ground that the libel herein charges petitioner with misconduct that certainly tend to make him an object of public hatred, ridicule and contempt, which, under the law of Wisconsin constitutes libel *per se* and requires entry of a judgment in his favor and against respondents. The Supreme Court of Wisconsin has wholly evaded these facts.

3. That other irregularities all of them discriminating against the constitutional rights of your petitioner and in favor of respondents add to the seriousness of the situation and the insecurity of the citizen in the protection of his constitutional rights by the courts of his own state.

4. That in these days of international hatred and possible impending war, the public opinion of a state or of a large and respectable portion of its citizens may be led by arbitrary acts of injustice to doubt the reality of this government being one devoted to security of life, liberty and reputation of its citizens when wantonly attacked. The nation is now rightfully emphasizing the duty of citizens to support their government financially and with their health, their bodies and their lives. Is there no correlative duty on the part of the government to protect its citizens against wanton injustice?

5. The facts in this regard appear *ante* in Divisions I and II, pages 2 to 13.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this court for its review and determination, on a day certain therein to be named, a full and complete transcript and the record of all proceedings in the case numbered and entered on its docket, No. 89 January Term, 1941, entitled Daniel W. Hoan, plaintiff and appellant, *vs.* The Journal Company, Harry J. Grant and Lawrence C. Eklund, defendants and respondents, and that said order for

judgment made and entered in said case, May 20, 1941, and rehearing thereon denied under date of July 7, 1941, be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

FRANCIS E. MCGOVERN,
Counsel for Petitioner.

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA. } ss.

DANIEL W. HOAN, being first duly sworn, on oath says that he is the petitioner named in and who signed the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

DANIEL W. HOAN,
Petitioner.

Subscribed and sworn to before me this 1st day of October, 1941.

VIRGINIA COMFORT,
(NOTARIAL SEAL) *Notary Public.*

My commission expires June 15, 1946.